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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY, *Petitioner,*

—against—

NATIONAL LABOR RELATIONS BOARD, and INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,800 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 37,000.

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[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(1).

An overwhelming majority of members of the National Chamber are engaged in interstate commerce or activities which affect interstate commerce and are subject to the National Labor Relations Act. Because of the significance of the legal issues involved in this case, and because of their substantial effect, both immediate and potential, upon its members, the National Chamber submits this brief *amicus curiae* in support of the position of petitioner urging review by this Court of the decision below.

The far reaching consequences that this decision may have for American industry have stirred widespread national concern in industry's ranks and have created confusion among them regarding the boundaries of the duty to bargain in good faith under Section 8(a)(5) of the National Labor Relations Act, as amended (the "Act"), as well as the scope of an employer's constitutional and statutory right to communicate with his employees.

The National Chamber, as an organization whose membership is broadly representative of the commerce and industry of this country, is in a unique position to present to this Court practical insights, concerning the impact of this decision on collective bargaining in general and the conflicts which it creates.

ARGUMENT

In this brief the National Chamber will limit itself to discussion of the conflicts created by the holding below on the central issue in the case.

Employers have until now looked to the decisions of this Court in *NLRB* v. *Insurance Agents' Union, AFL-CIO*[2] and *NLRB* v. *American National Insur-*

[2] 361 U.S. 477 (1960).

ance Company[3] as defining the elements of good faith in bargaining and as identifying a genuine desire to reach agreement coupled with meeting and conferring in good faith to that end as a discharge of the statutory duty.

The assumption by the Board in the case at bar of the role of regulatory agency over the substance and techniques of bargaining and over the adequacy of concessions made by the parties therein is in conflict with and casts question and doubt on those decisions. The absence of the regulatory power here asserted by the Board had been made explicit in 1947 when Congress enacted Section 8(d) of the Act. Congress then expressed the fear that the Board had "gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of concessions an employer must make and of the proposals and counterproposals he may or may not make." It concluded that "unless Congress writes into the law guides for the Board to follow the Board may attempt to carry this process even further and seek to control more and more the terms of collective bargaining agreements." 1 Leg. Hist. of the Labor-Management Relations Act of 1947 at 310-12. The House Conference Report subsequently described the resultant bill as having achieved this objective:

> "... the Senate amendment [now Section 8(d)], while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as did the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus pre-

[3] 343 U.S. 395 (1952).

vented the Board from determining the merits of the position of the parties." *Id.* at 538.

Section 8(d) notwithstanding, the fears of Congress have been proven justified by, among others, the Board's action in this case, as well as by its decision in another case presently pending before this Court on writ of certiorari and in which the Chamber previously filed briefs *amicus curiae*.[4]

Additional confusion was created by the denials contained in the opinions of both judges who made up the majority below (App. A. 52, 55)[5] of any intent to forbid the "best offer first" bargaining technique or the right of an employer to make and stand by an initial offer, while at the same time applying a standard of good faith bargaining which would effectively foreclose the use of such techniques if coupled with a full exercise of free speech to employees.

Until now the right of an employer freely to express his opinions, views or arguments had been considered assured by the First Amendment to the Constitution and Section 8(c) of the Act. Nevertheless, the Labor Board in this case sought to regulate the volume and content of non-coercive employer communications on the unprecedented ground that they emphasized a policy of firmness in bargaining of which it disapproved. The inevitable effect of such regulation is to curtail, if not completely shut off, employer communications during and prior to negotiations in order to avoid the risk of a Board finding that the employer's

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[4] *H. K. Porter Company, Inc. (Disston Division—Danville Works)* v. *NLRB*, No. 230, October Term, 1969.

[5] Reference is to Appendix A to the petition of the Company herein.

views somehow manifested a degree of resolve or firmness which would, in the Board's subjective opinion, tend to inhibit the employer's ability to make further concessions in bargaining. Such an effect is contrary to this Court's expressed views on free speech in labor relations. See *e.g., Thomas* v. *Collins,* 323 U.S. 516, 532 (1945); *Linn* v. *United Plant Guard Workers of America,* 383 U.S. 53, 62 (1966). It also is contrary to the express language of Section 8(c) of the Act.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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